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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of

Billed Party Preference for
InterLATA 0+ Calls

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CC Docket No. 92-77

**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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SUMMARY

The concept of billed party preference ("BPP") originally was proposed to the Commission in 1986, before competition in operator services, before payphone competition, before dial-around, before TOCSIA, and before the Telecommunications Act of 1996's mandate to establish "a pro-competitive, de-regulatory national policy framework" for the entire telecommunications industry. While the BPP idea initially held some superficial appeal, the record upon further analysis demonstrated that BPP would be a multi-billion dollar regulatory fiat that would inconvenience and confuse more callers than it could benefit and would substantially raise barriers to entry in operator services. Moreover, the operator services industry, and government regulation of it, have succeeded in addressing most of the problems BPP purportedly would solve. Like one of Rube Goldberg's machines, BPP attacks a simple problem with a complex, overly-regulatory re-engineering of the entire operator service marketplace. The time for such a "solution" -- if it ever came -- has long since passed.

One principal concern remains in operator services -- excessive rates charged by some OSPs for 0+ calls. The Commission, which correctly recognizes that BPP neither is necessary nor particularly helpful in addressing this limited problem, nevertheless proposes an alternative that is equally unacceptable: that OSPs charging more than 115 percent of the weighted average rates charged by the "Big Three" long distance service providers should be required to quote their exact rates on each call. Other OSPs would avoid any additional regulatory requirements, however.

CompTel submits that the Commission lacks a legal basis to adopt its proposal. The proposal is inconsistent with the Commission's authority under TOCSIA,

which permits an additional disclosure (although not the disclosure proposed by the Commission) only upon a finding that an OSP's rates appear to be unjust or unreasonable. It also is inconsistent with the Commission's authority to engage in industry-wide ratemaking, which requires an affirmative finding -- based upon record evidence -- that the proposed benchmark is a just and reasonable rate for the industry as a whole. Moreover, other potential sources of authority require that carriers receive a "full opportunity for hearing" *before* any additional requirements could be imposed.

In order for any benchmark to meet applicable statutory and constitutional requirements, the Commission must rely on evidence that the proposed benchmark is just and reasonable. The record in this proceeding supports a benchmark *only* at the levels proposed by the industry coalition in support of the Coalition Rate Ceiling. The Coalition rate levels are consistent with OSP costs (including the cost of aggregator presubscription agreements) and with rates generally charged in the away from home environment. Therefore, if the Commission adopts a benchmark, it should set that benchmark at the rate levels proposed by the Coalition Rate Ceiling. Otherwise, the Commission has no choice but to require a rate disclosure from *all* operator service providers, regardless of the rates they actually charge.

However, even if some additional disclosure is required, the Commission cannot mandate the disclosure of exact charges prior to every call. The only legal authority for a special disclosure is provided by TOCSIA, which only authorizes the Commission to require OSPs to state that rates are available upon request. No provision of the Communications Act, in TOCSIA or elsewhere, authorizes the Commission to require OSPs to quote rates on each call. Further, any such requirement is impractical and unwise. Additional disclosures would increase call set-up times and may be incompatible with many

OSP systems. The proposal also would confuse many callers by depriving consumers of a basis for judging the quoted rate, would frustrate uniformity in 0+ calling, and also would increase OSPs' costs, thereby creating further pressure to increase, not lower, rates. Accordingly, at most, the Commission may require carriers to state that their rates are available to callers upon request.

Regardless of what alternative to BPP the Commission considers, one conclusion is inescapable: BPP is inconsistent with the public interest. Therefore, the BPP proposal should be rejected. The lingering existence of the BPP docket continues to harm OSPs by making it more difficult for them to access capital and by increasing aggregator demands for accelerated commissions to recoup their own investments. This result serves only to exacerbate the very problem that the Commission is attempting to fix. Accordingly, the Commission should reject BPP, once and for all, and terminate this docket.

Finally, CompTel supports the proposal to forbear from requiring OSPs to file informational tariffs, but only if such forbearance is permissive and applies without regard to the OSP's rates.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments in response to the Commission's *Second Further Notice of Proposed Rulemaking* in the above-captioned docket.¹ For the reasons explained below, CompTel submits that the Commission correctly determines that the "billed party preference" ("BPP") concept is unworkable and anticompetitive, but that the Commission would commit serious errors of law and policy if it required the price disclosure alternative proposed in the *Second Further Notice*. By tying a benchmark to the three largest IXC's rates, rather than basing it upon OSP costs and revenue requirements, the Commission exceeds its statutory and constitutional authority to engage in ratemaking. The Commission must instead base any benchmarks it establishes upon the rates set forth in the Coalition Rate Ceiling proposal, or, in the alternative, apply an even-handed disclosure requirement (consistent with the disclosure authorized by TOCSIA) to all OSPs, regardless of the rates they charge.

¹ FCC 96-253 (rel. June 6, 1996) ("*Second Further Notice*"); see 61 Fed. Reg. 30581 (June 17, 1996).

I. INTRODUCTION AND BACKGROUND

The concept of billed party preference has been under consideration for nearly ten years. Originally proposed in 1986, BPP predates the fundamental elements of today's operator services market. It was conceived before operator service competition, before TOCSIA, before 0+ presubscription and LEC card equal access, before AT&T issued 40 million proprietary CIID cards, and before the heavy promotion and use of dial around services like 800-COLLECT. Now, in light of these significant changes in the operator services marketplace, BPP is an oddity whose time -- if it ever came -- has long since passed.

Indeed, during the Commission's examination of the proposal, what little support there had been for BPP has virtually disappeared. Four RBOCs actively oppose BPP, as do several independent LECs and LEC associations, including Cincinnati Bell, Frontier (formerly Rochester Telephone), Southern New England Telephone Company, NTCA, and OPASTCO. Among the operator services industry, all OSPs oppose BPP except MCI and Sprint, who hope to increase their 0+ market share by governmental fiat rather than through competition. Even a number of state regulators raised significant concerns with the BPP proposal.

The reasons for this opposition are not difficult to understand. Like one of Rube Goldberg's machines, BPP attacks the simple problem of high OSP rates with a complex re-engineering of operator services call processing, carrying with it the third set of new dialing habits in ten years and a host of financial, technical and competitive obstacles. For example, BPP would:

- affect the routing of, at most, 20 percent of all operator service calls;

- make dialing procedures less uniform and more complex;
- increase call set-up times and force many callers to deal with two, rather than one, operator; and
- harm competitive access arrangements and strand millions of dollars worth of "smart" telecommunications equipment

Moreover, all of this would be accomplished for a price tag likely to exceed \$2 billion.

As a result of BPP's overwhelming disadvantages, CompTel joined a broad industry Coalition to develop an alternative which addressed excessive OSP rates directly, promptly, and without billions of dollars in unnecessary investment. The Coalition's proposal attacked OSP rates directly by identifying a series of benchmarks at which total end user charges -- including all commissions and aggregator imposed fees -- would be considered presumptively lawful. These benchmarks would act as an industry rate ceiling, with OSPs proposing to charge rates above the benchmarks having to justify their rates to the Commission. The Rate Ceiling was supported by simple periodic reports from LECs identifying any above-benchmark rates billed by OSPs, thereby providing the Commission with information to assist it in monitoring and enforcing the benchmarks.

The Coalition's benchmark levels were selected with an eye to harmonizing the consumer's interest in reasonable rates with the legitimate rights of OSPs and aggregators to cover their costs of providing the service. The actual rates selected were developed by the Coalition after review of consumer complaints, OSP industry costs, and the Commission's past experience with the benchmark approach in the OSP market. In order to ease administrative burdens, the Coalition proposed two simple sets of benchmarks, one for person-to-person calls and one for all other operator service call types, irrespective of time of day, distance, or other factors which could complicate determinations of OSP compliance.

With this *Second Further Notice of Proposed Rulemaking*, the Commission seeks comment on a different alternative to BPP. Rather than the Coalition Rate Ceiling, the Commission proposes to require OSPs with "high" rates to disclose on each operator service call the rate at which the call will be billed.² This additional obligation is proposed to apply to all carriers with rates that exceed 115 percent of the weighted average of the rates charged by AT&T, MCI, and Sprint for a comparable call.³

II. THE COMMISSION WOULD COMMIT REVERSIBLE LEGAL ERROR IF IT BASED ITS BENCHMARKS ON THE RATES OF THE THREE LARGEST IXC's

This proceeding is specifically targeted toward operator service providers, with one of the Commission's goals to "reform" the operator service industry.⁴ CompTel shares the Commission's concern over the problem caused by high operator service rates. Excessive rates by some OSPs have tarnished the image of the entire OSP industry and are contributing to a significant decline in 0+ calling, regardless of which OSP is presubscribed to the telephone. The industry must act to address these rates, or the decline will continue and accelerate.

However, the problem of excessive rates charged by some OSPs does not give the Commission *carte blanche* to re-shape operator services in any way it sees fit. It is axiomatic that the Commission does not have unlimited authority to restrict or condition the

² *Second Further Notice*, at ¶ 35.

³ *Id.* at ¶ 24.

⁴ See, e.g. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunication Act of 1996*, at ¶ 1 n. 8, CC Docket No. 96-128, FCC 96-254 (rel. June 6, 1996) (referring to Docket 92-77 as the "OSP Reform" docket).

operations of common carriers; it may regulate only insofar as it is specifically authorized by the Communications Act.⁵ The Commission's proposal to require disclosures by carriers with rates above 115 percent of the rates of the "Big Three" interexchange carriers exceeds the Commission's authority under TOCSIA, Sections 201-205, and the other provisions of the Communications Act which the Commission cites as authority for its proposal.

A. The Proposal is Not Authorized By the Commission's Power Under TOCSIA

Since this proceeding directly targets the operator services industry, it is not unexpected that the Commission cites to the Telephone Operator Consumer Services Improvement Act ("TOCSIA") as authority for its proposal.⁶ However, TOCSIA does not authorize the Commission to require OSPs to announce their rates on every call.

In 1990, Congress enacted TOCSIA to regulate the then-nascent operator services industry. TOCSIA is carefully crafted to provide a market solution to the unfair practices of some industry participants by providing consumers with the ability to reach an operator service provider of choice and sufficient information to identify the presubscribed OSP for an aggregator telephone. TOCSIA requires aggregators who make their telephones available for use by the public to unblock access to OSPs other than the presubscribed carrier, and to provide consumer information disclosures on or near each telephone.⁷ In addition, OSPs are

⁵ See, e.g. *MCI v. AT&T*, 114 S.Ct. 2223, 2233 (1994) ("For better or worse . . . the Commission's desire "to increase competition" cannot provide [it] authority to alter [a well established statutory structure]").

⁶ Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990), *codified at* 47 U.S.C. § 226.

⁷ 47 U.S.C. § 226(c); see 47 C.F.R. §§ 64.703(b); 64.704.

required to audibly identify themselves, to allow consumers to hang up without incurring any charges, and to provide, upon request, a rate quote before the consumer places a call.⁸

TOCSIA also imposed certain reporting and tariffing requirements on OSPs, and granted the Commission specific statutory authority to regulate OSPs. Importantly, Congress granted the Commission power to address the problem the *Notice* identifies here -- excessive OSP rates. That section, Section 226(h), authorizes the Commission to review OSP informational tariffs and take action if the OSP's rates and charges "*appear upon review . . . to be unjust or unreasonable.*"⁹ Specifically, if the OSP's rates appear to be unreasonable, the Commission may require the OSP to do either *or* both of the following: (1) to demonstrate its rates are just or reasonable, or (2) to announce on each call that its rates are available on request.

The Commission has not made any findings that OSP rates above the 115 percent benchmark are unreasonable. It has not conducted an analysis of OSPs' costs of service. It does not have before it any evidence that rates at this level provide OSPs with a reasonable return on their investments. Nor does the Commission have any evidence that the rates forming the basis of the benchmark -- the rates of AT&T, MCI and Sprint -- are themselves reasonable, whether for those carriers or for other OSPs. Further, there is no support whatsoever -- and no explanation by the Commission -- for the selection of 115 percent as a maximum permissible variance for operator service rates. Without this evidence, the

⁸ 47 U.S.C. § 226(b)(1)(A); *see* 47 C.F.R. § 64.703(a). In addition, as a transitional measure, OSPs also were required, for a three year period after TOCSIA was enacted, to provide a second brand, immediately before connecting the call for call completion. 47 U.S.C. § 226(b)(2). Most CompTel member OSPs voluntarily continue to provide this second brand today.

⁹ 47 U.S.C. § 226(h)(2)(B) (*emphasis added*).

Commission is unable to make the requisite statutory finding that OSP rates above the 115 percent benchmark "appear to be unreasonable" to enable the Commission to act pursuant to Section 226(h)(2).

Even if the Commission ultimately reaches this conclusion (upon consideration of valid record evidence), the proposal exceeds the agency's statutory authority. Section 226(h)(2) does not authorize the Commission to require OSPs to quote their exact charges on each call. It allows the Commission to require the OSP to present a rate case *and/or* to "announce that its rates *are available on request* at the beginning of each call."¹⁰ Thus, the express grant of congressional authority allows the Commission only to require OSPs to state that rates are "available on request." Moreover, the Commission may not rely on Section 201 of the Act to provide authority where TOCSIA denied it. The fact that Congress provided express authority in Section 226(h) to require a special rate availability brand strongly suggests that, in the drafters' view, the authority to require special call branding cannot be found elsewhere in the Communications Act.¹¹

The Commission similarly cannot rely on Section 226(b) for authority to require the proposed disclosure. Section 226(b) requires each OSP to "identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call." Significantly, this requirement is that OSPs *identify* themselves, not that they announce other pieces of information the Commission determines a

¹⁰ 47 U.S.C. § 226(h)(2) (emphasis added).

¹¹ It is a well-accepted maxim of statutory construction that "general language of a statute usually does not apply to a matter specifically dealt with in another part of the same statute." See, e.g., *AT&T v. FCC*, 487 F.2d 865, 877 n.26 (citing *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

caller *ought to* find relevant. The claim that the price disclosure "is consistent with TOCSIA's directive that we require OSPs to identify themselves . . ." defies a common sense reading of Section 226(b).¹² Identification is not "disclosure," nor can identification of the OSP be equated with identification of its rates.¹³ The Commission is not free to circumvent the OSP branding requirement by using it as a vehicle to bootstrap any information disclosure the Commission desires.

B. The Proposal is Not Authorized by the Commission's Power to Engage in Industry-Wide Ratemaking

The proposal in the *Second Further Notice* plainly is intended to discourage rates above the 115 percent benchmark, and the consequences of exceeding this benchmark are severe. Only those above the benchmark are required to integrate real-time rating capabilities into their automated call processing systems. Only those above the benchmark are required to inconvenience their customers by adding to their call set-up time. Only those above the benchmark will have to deal with the stigma of a "kill message" and only those above the benchmark will have to devote additional live operators to explaining to confused callers what the message means. In effect, the 115 percent benchmark presents an OSP with a Hobson's choice: either "voluntarily" lower its rates to the benchmark or accept the

¹² *Second Further Notice*, ¶ 36.

¹³ Further, the Commission's conclusion that "few consumers can truly distinguish smaller OSPs from larger, better known OSPs, other than by price" (¶ 36) is nonsensical. Consumers are quite capable of distinguishing between "AT&T" -- a name with which it is bombarded in over \$750 million per year in advertising -- and an OSP name.

stigma, cost and inconvenience of the proposed disclosure. Thus, for all practical purposes, the proposal prescribes rates at the 115 percent standard.¹⁴

CompTel does not dispute that the Commission has authority to establish benchmark rates.¹⁵ However, to exercise this power, the Commission must engage in *ratemaking*. The courts have been consistent and clear that the Commission cannot prescribe a rate without evidence supporting the conclusion that the rate is just and reasonable.¹⁶ For example, the Second Circuit has held that:

The Commission's authority to prescribe rates and practices . . . is not unlimited. To prescribe a practice the Commission must find that it is 'just, fair and reasonable,' and to prescribe a rate it must find that the rate is 'just and reasonable.' Valid findings of this kind are therefore *essential* to any exercise by the Commission of its authority under § 205(a).¹⁷

¹⁴ Cf. *AT&T v. FCC*, 487 F.2d at 874 (to determine whether rates have been prescribed, court should look to "the actual impact of the agency action and not its form").

¹⁵ See 47 U.S.C. §§ 201(b), 205(a). As the Supreme Court has explained:

The Court has said that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as the determination itself."

In re Permian Basin Area Rate Cases, 390 U.S. 747, 776-77 (1968) (quoting *Los Angeles Gas Co. v. Railroad Comm'n*, 289 U.S. 287, 304 (1933) and *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), other citations omitted).

¹⁶ See, e.g., *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 337-38 (D.C. Cir. 1980).

¹⁷ *AT&T v. FCC*, 449 F.2d 439, 450-51 (2d Cir. 1971) (citations omitted and emphasis added; see also *AT&T v. FCC*, 487 F.2d at 875 ("There is no regulatory authority granted to the Commission . . . which permits it to circumvent the statutory plan of carrier initiated rate changes, a limited suspension period, rate refunds and rate prescriptions only after a full hearing and specific findings.")).

The Commission may not simply assume that a rate -- even one charged by a particular carrier in the market -- is necessarily just and reasonable. A rate may be established as a benchmark only upon *valid* findings (supported by record evidence) that the prescribed rate is just and reasonable.¹⁸ This the Commission has not done.

The Commission's rate disclosure proposal is not based on any study of OSP costs or revenues. There is no evidence -- and certainly no Commission finding -- which would support a rate benchmark at 115 percent of the "Big Three" carriers' rates. This omission is fatal to the Commission's exercise of its benchmark ratemaking authority under Section 205(a).

C. The Proposal Cannot Be Justified Under Provisions of the Act Which Require Carrier-Specific Hearings

The Commission also cites Sections 154(i) and "201-205" of the Communications Act as support for its proposal.¹⁹ None of these sections, however, authorizes the Commission to require OSPs to announce rates on each call.

The Commission's ratemaking authority under Sections 201-205 of the Act requires that the Commission provide affected carriers "a full opportunity for hearing" prior to prescribing a practice or rate.²⁰ When this authority is exercised to prescribe a "hard" rate (*i.e.*, that which a carrier may not exceed under any circumstances), the Commission must conduct a carrier-specific hearing. Further, the Commission may use its tariff review powers

¹⁸ *AT&T v. FCC*, 449 F.2d at 450-51.

¹⁹ *Second Further Notice*, ¶ 54.

²⁰ *See* 47 U.S.C. § 205(a).

(Sections 203 and 204) only in connection with "new" charges, *i.e.*, tariffs which are not yet in effect.²¹

Finally, the Commission's general powers under Sections 201 and 154(i) do not authorize action where specific provisions of the Act contradict the purported exercise of general authority.²²

D. The Commission's Invocation of "Consumer Expectations" is Insufficient to Authorize the Proposed Disclosure

The *Second Further Notice* presents as its basis for adopting the 115 percent benchmark that the rates allegedly are consistent with "the reasonable expectations of consumers."²³ This rationale for the benchmark is both legally and factually insufficient.

1. Consumer Expectations Is an Improper Legal Standard

First, the rates that consumers "expect" to pay are not a valid basis for prescribing carrier rates. As described above, an affirmative finding that the rate prescribed is just and reasonable is "*essential* to any exercise by the Commission of its authority under Section 205(a)."²⁴ This finding requires evidence of a carrier's costs and revenue requirements.²⁵

²¹ See 47 U.S.C. §§ 203, 204. Moreover, although the Commission does not mention its authority under Section 214, exercise of that power similarly requires a hearing and affirmative Commission public interest findings before a carrier's authorization may be modified. See *MCI v. FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977).

²² See 47 U.S.C. § 154(:) (FCC may perform actions "not inconsistent with" the Act)

²³ *Second Further Notice*, at ¶ 23. The Commission defines "consumer expectations" as the weighted average of the rates charged by AT&T, MCI and Sprint. *Id.*

²⁴ *AT&T v. FCC*, 487 F.2d at 874 (emphasis added).

The Commission must receive and consider evidence on these costs, rather than relying on vague conceptions of consumer "expectations" to guide its ratemaking.

2. The Commission Wrongly Relies on "Big Three" Rates to Define Consumer Expectations for Away From Home Calling

Moreover, as a factual matter, the Commission has no basis for concluding that consumers "expect" to pay no more than 115 percent of what the three largest long distance carriers charge. Operator services are but one form of calling options a consumer has when he or she is away from his or her home or office. In that environment, consumers regularly pay rates which vary significantly, most of which exceed the Commission's proposed benchmark.

Three examples illustrate the wide range of choices consumers have. First, in the hospitality market, callers frequently have the option of dialing long distance calls directly from their rooms and paying for them as part of their hotel bill. A survey taken by CompTel last summer found that a number of major hotels in Washington, D.C. charged 40 percent or more in excess of AT&T's daytime rates, even where AT&T was the presubscribed OSP for the telephone.²⁶ Similarly, another option that is becoming increasingly popular is for the customer to place an away from home call using his or her own cellular telephone.²⁷ This option also is significantly above the benchmarks

²⁵(...continued)

²⁵ See *Nader v. FCC*, 520 F.2d 182 (D.D.C. 1975) (statute requires the Commission to set a rate at a level that will recover a carrier's cost of service including a fair return on equity).

²⁶ See Attachment 1.

²⁷ In the alternative, travelers sometimes can rent a cellular telephone on a daily basis. Rates for such rentals can approach \$2 per minute of use. See Attachment 2.

proposed.²⁸ Third, even some away from home calling options offered by the "Big Three" carriers exceed the benchmarks proposed in the *Second Further Notice*. Sprint's debit card, for example, costs \$.58 per minute for domestic calls when a \$10 card is purchased.²⁹ At that rate, a 10-minute call would exceed the Commission's proposed customer dialed calling card charge by over \$1.³⁰ CompTel does not mean to suggest that any of the above rates are unreasonable. Rather, these examples demonstrate that, every day, customers can and do choose to pay charges which significantly exceed the proposed benchmarks. The assumption that these rates exceed those that consumers "expect" is unfounded.

The Commission cannot ignore these options on the theory that "most" operator service calls are carried by AT&T, MCI and Sprint.³¹ Even assuming that these carriers' rates apply to the majority of minutes from aggregator telephones, this fact does not define consumer expectations for *all* calls any more than the automobile prices of General Motors, Ford and Chrysler define consumer expectations for all automobiles. In addition, consumers legitimately expect to pay a "premium" for services when they are provided in certain

²⁸ Attachment 1. The attached charts included daily roaming charges, which were charged by nearly all providers at the time, and remain common today. However, even where daily roaming charges do not apply, current rates continue to exceed the proposed benchmarks. For example, Bell Atlantic NYNEX Mobile charges \$.59 per minute for roaming calls (without a daily roaming fee), *plus* applicable long distance charges from the caller's long distance carrier. Assuming a charge of \$.28 per minute for long distance (the standard rate charged by AT&T), a five minute call of a distance greater than 125 miles would cost \$4.35, well in excess of the \$2.8175 benchmark proposed for customer-dialed calling card calls.

²⁹ See Sprint Tariff F.C.C. No. 1, § 5.6.19, 2nd revised page 415.96 (July 10, 1995).

³⁰ Notably, debit cards avoid substantial costs otherwise associated with a calling card call, such as a third-party validation, billing and collection, and live operator expenses.

³¹ See *Second Further Notice*, ¶ 23.

circumstances.³² The Commission therefore cannot conclude that the rates of AT&T, MCI and Sprint define consumer expectations in all operator service contexts.

3. Defining the Benchmark by Reference to the "Big Three" Rates Denies OSPs Equal Protection of the Laws

Finally, the Commission's use of AT&T, MCI and Sprint rates to define consumer expectations violates the Equal Protection Clause of the U.S. Constitution. The benchmark proposed operates in a manner that almost guarantees these three carriers -- whose rates obviously are preferred by the Commission -- would not be subject to the effects of the rate benchmark, regardless of what rates they charge. To use the example of third-party, operator station rates described in Appendix D of the *Second Further Notice*, AT&T could raise its surcharge from \$2.25 to \$3.75 (an increase of over 67%), and, because its rate determines the benchmark, still fall within the benchmark rate (which would increase to \$3.76, all other factors being equal). Similar, but less pronounced preferences are available to MCI and Sprint.³³ Recent Supreme Court precedent confirms, however, that the Commission may not grant preferences to preferred classes of carriers, and penalize others, simply based upon a hostility toward the disfavored class. As the Supreme Court emphasized this Term, "If the constitutional conception of equal protection of the laws means anything, it

³² For example, a slice of pizza in many airports can cost up to \$3, even though some pizza chains charge as little as \$2.99 for an entire pizza at non-airport locations. Consumers expect that the restaurateur will charge a premium for the convenience of receiving that pizza at the airport.

³³ MCI, for example, could raise its third party surcharge to \$2.75 without exceeding the benchmark.

must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. "³⁴

The benchmark also acts to favor the Commission's three preferred carriers in another, more subtle way. Like other OSPs, these carriers typically permit aggregators who presubscribe to them to charge a premise-imposed fee for use of the telephone. Unlike other OSPs, however, AT&T, MCI and Sprint do not offer to bill and collect this charge for the premise owner, and require instead that the owner charge the user separately for it. Thus, at many hotels, users are charged an additional \$.75 or more to use phones presubscribed to AT&T.³⁵ However, despite the fact that this charge is part of the "total charges for which [consumers] would be liable," the amount is not included in the calculation of the benchmark. In effect, the Commission arbitrarily penalizes those OSPs that collect this charge on behalf of the hotel owner -- despite the fact that in both scenarios, the end user pays the charge, and the hotel owner receives the benefit of it. This distinction is arbitrary and capricious.

III. THE COMMISSION MAY BASE A BENCHMARK IN THIS PROCEEDING ONLY AT THE RATES PROPOSED IN THE COALITION RATE CEILING

As shown above, there are only two plausible bases for the Commission's proposed rate disclosure. The Commission could treat the disclosure as an industry-wide rate prescription pursuant to Section 205(a), or it could treat the benchmark as a finding that additional branding is required pursuant to Section 226(h)(2). In either case, however, the

³⁴ *Romer v. Evans*, 116 S.Ct 1620, 1628 (1995) (quoting *Dep't of Agriculture v. Moreno*, 413 U.S.528 (1973)).

³⁵ See Attachment 1.

receipt of record evidence demonstrating the reasonableness of the benchmark rates selected and an explicit finding that such level is just and reasonable for all carriers are required before the Commission can validly exercise its authority under the Communications Act. The Commission has not made such findings in support of the benchmarks proposed in the *Second Further Notice*.

CompTel submits that the *only* possible level at which the Commission might establish a benchmark which is supported by record evidence is at the rates contained in the Coalition Rate Ceiling proposal. This evidence shows that the rate benchmarks proposed in the Coalition Rate Ceiling are consistent with the cost structure of most OSPs participating in the industry.³⁶ Indeed, OSPs are non-dominant interexchange carriers. They do not have market power to dictate the rates they will charge. As the Commission recognizes, a large percentage of OSPs' costs are attributable to the cost of obtaining aggregator presubscription agreements and collecting aggregator-dictated "premises imposed fees" for presubscribed calls. As long as many aggregators "continue to base their presubscription decisions on the commissions that OSPs will pay them," OSPs will have no choice but to pay a commission level that the market dictates.³⁷ OSPs are not mini-monopolists earning exorbitant profits. They are non-dominant market participants seeking to recover their costs through the rates they charge end users.

The benchmarks proposed in the Coalition Rate Ceiling also are consistent with the FCC's own conclusions in the TOCSIA Final Report. There, after examining OSP cost and revenue data submitted to it, the Commission concluded that OSPs were not earning

³⁶ See CompTel Comments, at 8 (Apr. 12, 1995).

³⁷ *Second Further Notice*, at ¶ 7.

excessive profits.³⁸ In fact, the Commission found that OSP expenses were over 94 percent of total OSP revenues. Clearly, a prescribed rate of only 115 percent of AT&T, MCI and Sprint's rates is not sufficient to allow OSPs to recover their reasonable expenses.

Therefore, if the Commission wishes to subject OSPs with rates above a "reasonable" level to additional regulatory requirements, it must establish those benchmarks at the levels proposed in the Coalition Rate Ceiling Proposal. These are the only rates for which there is support for a conclusion that they are reasonable. CompTel does not object to additional branding requirements (consistent with the Commission's authority under TOCSIA) which are triggered by rates that are above Coalition Rate Ceiling levels.³⁹ In the alternative, the Commission could avoid the necessity for determining a just and reasonable rate if it applies an additional disclosure requirement to all OSPs in the market, regardless of the rates that they charge.

IV. IN ANY EVENT, THE PROPOSED DISCLOSURE IS NEITHER PRACTICAL NOR USEFUL TO CONSUMERS

In addition to the legal shortcomings of the Commission's proposed rate disclosure, it is impractical for OSPs to provide such information on every call processed. The Commission's belief that "most, if not all" OSPs could easily provide real-time rate information is mistaken.⁴⁰ The proposed benchmarks are very complex, containing, as the

³⁸ Final Report of the FCC Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, at 18 (Nov. 13, 1992) ("*TOCSIA Final Report*").

³⁹ However, to be consistent with *Permian Basin*, the Commission must allow OSPs an opportunity to avoid the additional branding requirement by demonstrating that their rates are just and reasonable. *Permian Basin*, 390 U.S. at 769-71.

⁴⁰ *Second Further Notice*, ¶ 34.

Commission notes, over 500 separate combinations of rate factors.⁴¹ This complexity adds to an OSP's costs, as it must develop more sophisticated call processing systems to compare the OSP's rates with those of the benchmarks. Moreover, the benchmarks impose features of the "Big Three's" rate structures on OSPs, such as time-of-day calling or distance sensitive rates. Some OSPs charge flat, "postalized" rates for operator service calls, regardless of distance. Others use mileage bands which do not coincide with the "Big Three's" classifications. The Commission's proposal, however, would inhibit carriers from offering innovative pricing structures to consumers. The proposal gives OSPs the choice either to modify their own rate structures to coincide with the Big Three's structures (thereby depriving consumers of the diversity that a fully competitive market offers), or to expend additional resources to capture information needed only to calculate whether compliance with the rate disclosure is necessary.

Second, the proposal assumes that OSPs perform real-time rating of each call they process. For many OSPs, rating ordinarily is performed separately from -- and well after -- call processing. OSP call processing systems typically are limited to collecting *solely* the information necessary to complete the call, such as valid billing information, and the destination telephone number. The attachment of an actual rate to the call is performed by the billing system, which also sorts and formats call records obtained from the OSP's switch records after the fact. The Commission's proposal, however, incorrectly assumes that OSPs operate systems perform the necessary rating on a real-time basis.⁴²

⁴¹ *Id.* at ¶ 26.

⁴² Although many OSPs use live operators to provide rate quotes to callers requesting such information, these systems could not be used to provide real-time analysis of all calls. Rate quotes typically are obtained by the operator collecting relevant information from the
(continued...)

Third, the disclosure itself would delay call processing and increase hold time.

Depending upon the alternative adopted by the Commission, the time necessary to give the disclosure could add from five to ten seconds, or more, to call set-up times. This increased time not only will inconvenience callers, but, because there is more time before a call is completed, will increase the percentage of calls that are abandoned prior to completion. It also will increase the access costs incurred by OSPs prior to call completions. In addition, it is likely that for at least some calls, two separate disclosures might result. Most OSPs as a practical matter would have to provide a disclosure after the initial bong tone to the caller, before the caller enters the billing method.⁴³ If the billing method turns out to be collect or third-party billed, it is not clear under the *Notice* whether the OSP would be required *also* to provide a disclosure to the billed party. If so, this would delay call processing even further.

Moreover, aside from the technical and financial disadvantages of the proposal, the information itself is likely to be confusing to many callers. First, because the disclosure might not be provided by all OSPs, the caller might become confused by the unusual circumstances under which he encountered the message. In response, the caller might either hang up, thinking he or she had dialed "wrong" or the phone was "broken" or might wait to talk to a live operator for further explanation of the message. The former operates as a "kill message" while the latter increases an OSP's costs even more, creating additional pressure for the OSP to raise its rates. In addition, the fact that only some carriers provide this

⁴²(...continued)

customer (number called, billing method, estimated length of call, etc) and accessing the rating system. Significant modifications would be necessary to automatic and adapt this system for use on every call

⁴³ Many OSP switches are incapable of varying the identification message depending upon the type of call placed. Thus, for any disclosure requirement, the OSP would have to give the disclosure on all calls, regardless of call type.

disclosure will diminish the utility of the information because callers would not have a reference point against which to judge the quoted rate. Callers will not have a clear idea, for example, of what AT&T charges for the call, and may abandon a rate that appears "high" in the abstract, but is in fact in line with a rate over AT&T rates that the customer would have been willing to pay.

V. THE COMMISSION SHOULD REJECT BPP, ONCE AND FOR ALL

In the *Second Further Notice*, the Commission finds that the record in this docket supports the adoption of an alternative to BPP.⁴⁴ Although CompTel has some concerns with the alternative that the Commission endorses, it agrees with the Commission's implicit conclusion that the record demonstrates BPP is not in the public interest. For the reasons explained below, CompTel recommends that the Commission make that implicit finding explicit, and that it expressly reject BPP.

There is overwhelming evidence in the record demonstrating that BPP is unworkable and undesirable. For example, the record as compiled thus far clearly reveals, *inter alia*:

- BPP would cost \$2 billion or more to implement,⁴⁵
- BPP would make national dialing uniformity worse, not better,⁴⁶

⁴⁴ *Second Further Notice* at ¶ 3.

⁴⁵ CompTel Reply Comments at 6-10 (Sept. 14, 1994); AT&T Reply Comments at Attachment B (Sept. 14, 1994). Some studies estimate even higher costs. See Strategic Policy Research, *Quantifying the Costs of Billed Party Preference*, submitted by American Public Communications Council, Sept. 14, 1994.

⁴⁶ See CompTel Comments, at 20-22 (Aug. 1, 1994).